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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

REMBERTO SAINEZ, as Trustee, etc., Plaintiff and Appellant, v. SAN FRANCISCO RESIDENTIAL RENT STABILIZATION AND ARBITRATION BOARD, Defendant and Respondent.	A153167 (City & County of San Francisco Super. Ct. No. CPF-16-515179)

Remberto Sainez, as trustee of the Remberto Sainez Trust, appeals the denial of his petition for a writ of administrative mandamus. The petition seeks to compel the San Francisco Residential Rent Stabilization and Arbitration Board (Rent Board) to authorize a market-rate rent increase for an apartment owned by the trust on the ground that the master tenant was no longer permanently residing in the unit. Sainez contends the Rent Board improperly interpreted Civil Code[1] section 1954.50 et seq., the Costa-Hawkins Rental Housing Act (the Act), to permit a master tenant to "permanently reside" in more than one residential rental unit. This court requested supplemental briefing on whether the Rent Board's decision may be upheld on the alternate ground that the requested rent increase is not authorized because one of the subtenants has resided in the unit with the landlord's permission from the start of the tenancy and remains an occupant in lawful possession of the unit. Having considered the supplemental briefing, we affirm the denial

[1] All statutory references are to the Civil Code unless otherwise noted.

of the writ of mandate on this alternative ground and, therefore, do not reach the issue of whether a master tenant may as a matter of law have only one permanent residence.

Background

Statutory Background

The Act, enacted in August 1995, "established 'what is known among landlord-tenant specialists as "vacancy decontrol," declaring that "[n]otwithstanding any other provision of law," all residential landlords may, except in specified situations, "establish the initial rental rate for a dwelling or unit." (. . . § 1954.53, subd. (a).)' [Citation.] The effect of this provision was to permit landlords 'to impose whatever rent they choose at the commencement of a tenancy.' " (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1237.) Section 1954.53, subdivision (d), addresses "vacancy decontrol" in circumstances involving sublets. Subdivision (d)(1) recognizes that landlord's right to include in a lease or rental agreement "the rental rates to be applicable in the event the rental unit subject thereto is sublet." Subdivision (d)(2) provides generally, that "[i]f the original occupant or occupants who took possession of the dwelling or unit pursuant to the rental agreement with the owner no longer permanently reside there, an owner may increase the rent by any amount allowed by this section to a lawful sublessee or assignee . . . ." Under subdivision (d)(3), however, the increase authorized by subdivision (d)(2), "does not apply to partial changes in occupancy of a dwelling or unit where one or more of the occupants of the premises, pursuant to the agreement with the owner provided for above, remains an occupant in lawful possession of the dwelling or unit . . . ."[2]

[2] Section 1954.53, subdivision (d) in relevant part reads as follows: "(1) Nothing in this section or any other provision of law shall be construed to preclude express establishment in a lease or rental agreement of the rental rates to be applicable in the event the rental unit subject thereto is sublet. Nothing in this section shall be construed to impair the obligations of contracts entered into prior to January 1, 1996. [¶] (2) If the original occupant or occupants who took possession of the dwelling or unit pursuant to the rental agreement with the owner no longer permanently reside there, an owner may increase the rent by any amount allowed by this section to a lawful sublessee or assignee who did not reside at the dwelling or unit prior to January 1, 1996. [¶] (3) This subdivision does not

Section 37.3 of the San Francisco Administrative Code, the Residential Rent Stabilization and Arbitration Ordinance, limits the circumstances in which a landlord may impose a rent increase upon "tenants in occupancy." A "tenant" is defined as a "person entitled by written or oral agreement, sub-tenancy approved by the landlord, or by sufferance, to occupy a residential dwelling unit to the exclusion of others." (*Id.*, § 37.2, subd. (t).) Rule 1.21 of the Rent Board's rules and regulations[3] defines a "tenant in occupancy" as "an individual who otherwise meets the definition of tenant as set forth in Ordinance Section 37.2(t), and who actually resides in a rental unit . . . . Occupancy does not require that the individual be physically present in the unit or units at all times or continuously, but the unit or units must be the tenant's usual place of return." Section 37.3, subdivision (d)(2)(A) of the ordinance expressly incorporates the provisions of section 1954.53, subdivision (d) of the Act.

Factual Background

The Remberto Sainez Trust owns the apartment building located at 28-30 Clarion Alley in San Francisco. Sainez, as trustee, manages the property.

Alfredo Suarez moved into 28 Clarion Alley in 1999. At that time, there were 13 or 14 people living in the unit and a man named "Juan" was the master tenant. The master tenant was responsible for collecting rent from the subtenants and paying the landlord. In June or July of 2004, Juan moved out of the unit and, pursuant to an oral agreement, Suarez became the master tenant. At that time, there were eight occupants living in the unit, including Suarez and subtenant Juan Hernandez, who had been living in the unit since 2001. Sainez's wife approved Suarez as the master tenant because on previous occasions Suarez had accompanied the former master tenant Juan (not Juan Hernandez)

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apply to partial changes in occupancy of a dwelling or unit where one or more of the occupants of the premises, pursuant to the agreement with the owner provided for above, remains an occupant in lawful possession of the dwelling or unit, or where a lawful sublessee or assignee who resided at the dwelling or unit prior to January 1, 1996 remains in possession of the dwelling or unit. Nothing contained in this section shall be construed to enlarge or diminish the owner's right to withhold consent to sublease or assignment."

[3] All rule references are to the Rent Board Rules and Regulations.

to deliver the rent. Sainez has not disputed the statements contained in Suarez's pre-hearing submission that when Suarez entered into the oral lease agreement, Sainez "indicated that Mr. Suarez could move as many people into the property as he wanted and they could 'live like sardines' as far as Mr. Sainez was concerned," and that Hernandez had "lived at the property for many years" and had "been present at various times when Mr. Sainez visited the property to make repairs."

In June 2015, Suarez and his girlfriend entered into a lease on a different apartment. Suarez pays half the rent on that unit as well as his share of the rent on the Clarion Alley apartment. Most of his clothes and possessions remain at the Clarion Alley apartment but he sleeps there only one or two nights a week.

In September 2015, Sainez filed a petition with the Rent Board seeking to determine whether he may increase the rent on the subject unit without limitation. The petition asserted that the Clarion Alley apartment is no longer Suarez's "principal place of residence."

Following an evidentiary hearing, the Rent Board's Administrative Law Judge (ALJ) issued a decision denying the petition. The ALJ found that Suarez was not a "tenant in occupancy" under the local rent ordinance because the unit was not Suarez's "principal place of residence," but that the unit was the principal place of residence of three other tenants, including Hernandez. These others were "tenants in occupancy" under the local rent ordinance so that the requested rent increase was not authorized under the local rules.

The ALJ found further that the requested rent increase was not authorized by section 1954.53 of the Act because Suarez continues to "permanently reside" in the unit. The ALJ explained, section 1954.53 "does not define the terms 'permanently reside' or 'remains an occupant in lawful possession' of the unit. Nothing in the language of the statute, however, purports to limit a tenant to a single residence or require a tenant to maintain the unit as an exclusive or principal place of residence. Absent such a statement of intent by the Legislature, the undersigned . . . finds that a tenant may 'permanently reside' or 'remain an occupant in lawful possession' of more than one unit."

Following the denial of his appeal to the full Rent Board, Sainez filed the present petition for a writ of administrative mandamus. The trial court denied the writ petition on the ground that Sainez failed to establish a prejudicial abuse of discretion by the Rent Board. Sainez timely filed a notice of appeal.

Discussion

As the party seeking a writ of administrative mandamus, Sainez bears the burden of showing that the Rent Board's decision was "a prejudicial abuse of discretion." (*Cobb v. San Francisco Residential Rent Stabilization & Arbitration Bd.* (2002) 98 Cal.App.4th 345, 350.) "An abuse of discretion is established if the agency has not proceeded in the manner required by law, its decision is not supported by the findings, or the findings are not supported by the evidence." (*Id.* at pp. 350-351.) Because Sainez does not challenge the Rent Board's factual findings, we review de novo the determination that the proposed rent increase is not authorized. (See *Tanner v. Public Employees' Retirement System* (2016) 248 Cal.App.4th 743, 753 [" '[T]he proper interpretation of a statute, and its application to undisputed facts' " is a question of law subject to de novo review.].)

In *Mosser Companies v. San Francisco Rent Stabilization & Arbitration Bd.* (2015) 233 Cal.App.4th 505, 512-513, this court held that an "original occupant . . . who took possession of the dwelling or unit pursuant to the rental agreement" (§ 1954.53, subd. (d)(2)) includes "an individual who has resided in the dwelling from the start of the tenancy with the landlord's permission," whether or not that individual was himself "a party to the rental agreement." Here, the Rent Board found that Suarez entered into an oral lease with the landlord in 2004. While Suarez lived in the unit earlier than that date, the oral lease created a new tenancy with Suarez as the master tenant. (See *Cobb v. San Francisco Residential Rent Stabilization & Arbitration Bd., supra*, 98 Cal.App.4th at p. 352 [new tenancy was created when landlord accepted rent from subtenant after original tenant moved out of the unit].) Hernandez moved into the unit in approximately September 2001, before the new tenancy was established. Accordingly, the Rent Board found that Hernandez was a "tenant in occupancy" under the rent ordinance and that he occupied the apartment with the landlord's permission or at least with the landlord's

knowledge and without objection. (See <https://www.merriam-webster.com> [as of July 22, 2019] [defining sufferance as "consent or sanction implied by a lack of interference or failure to enforce a prohibition"].) Thus, the requested rent increase is not authorized by section 1954.53 because Hernandez has lawfully resided in the dwelling from the start of the tenancy and "remains an occupant in lawful possession of the dwelling or unit" under subdivision (d)(3).

Sainez's arguments to the contrary are not persuasive. Sainez argues that the oral rental agreement was with Suarez only and that Hernandez "was never an approved tenant and never had any agreements with the owners." In *Mosser Companies v. San Francisco Rent Stabilization & Arbitration Board*, *supra*, 233 Cal.App.4th at page 513, this court distinguished the term "occupant" from "tenant" or "lessee" in rejecting the argument that an occupant must be a party to the rental agreement. Moreover, Sainez presented no evidence that the oral lease required the landlord's express approval of a subtenant's occupancy. To the contrary, substantial undisputed evidence established that Sainez was aware that multiple subtenants were occupying the unit and permitted that arrangement to continue. Because Hernandez remains an occupant in lawful possession of the unit pursuant to the 2004 oral lease with Suarez, the rental increase is prohibited by the first clause in subdivision (d)(3) of section 1954.53, even though his occupancy commenced after January 1, 1996, which would have invoked the second clause of subdivision (d)(3).

Disposition

The judgment is affirmed.

POLLAK, P. J.

WE CONCUR:

STREETER, J.
TUCHER, J.